Petition not printed

No. 156

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

MILTON ROE SABIN AND BERTHA FLORENCE SABIN,
Petitioners,

vs.

THE MIDLAND SAVINGS AND LOAN COMPANY, a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BOUND CLOSE

In The

Supreme Court of the United States

October Term, 1959

No. 156

Milton Roe Sabin and Bertha Florence Sabin,
Petitioners,

vs.

The Mutual Service and Loan Company, a Corporation,
Respondent.

[illegible]

BRIEF FOR RESPONDENT IN OPPOSITION

[illegible]

The opinion of the Supreme Court of the State of Oklahoma is reported at 178 Okla. 52, 61 P. (2) 1001 (R.38). The decision of the District Court for the Northern District of Oklahoma, granting the then defendant's Motion for Summary Judgment (R.56), does not appear in an official reporter. The decision of the United States Court of Appeals for the Tenth Circuit (R.287) is reported at 178 F. (2d) 923, and, in full, is as follows: "PER CURIAM. Appeal dismissed January 5, 1950, on motion of appellee."

NTER

STATEMENT

This litigation concerns the attempts of a litigious woman to keep before the Courts a law suit which has long since attained the badge of "vexatious".

On August 18, 1933, seventeen years ago, this litigation commenced when the present respondent filed its petition in the District Court of Tulsa County, Oklahoma (R.20), asking for judgment against the present petitioners for the sum of Thirteen Thousand Three Hundred Sixty-six and 12/100 Dollars, for attorney fees, for costs, and for a decree of foreclosure of a certain mortgage on Lot 11, Block 7, in Sunset Terrace, an Addition to the City of Tulsa, Oklahoma, given to secure a loan of Thirteen Thousand and no/100 Dollars made to the present petitioners on July 28, 1928.

In these original foreclosure proceedings, petitioners answered and counterclaimed (R.26), a fair trial was had, the petitioners being present in person and by attorney, and judgment was entered in favor of respondents on May 8, 1935 (R.34). Appeal was taken by the petitioners to the Supreme Court of the State of Oklahoma; the lower court was affirmed on October 20, 1936; and mandate was filed on November 17, 1936 (R.38).

An action based on the identical facts decided by the Oklahoma Supreme Court was filed by the petitioners in the District Court of Tulsa County, Oklahoma, on May 7, 1938 (R. 199, 200). Repeated motions and demurrers were sustained in favor of the present respondents (R.199), and, on October 27, 1944, after six years of adverse rulings, the petitioners dismissed without prejudice (R.210).

On October 26, 1945, the petitioners again began to litigate on the identical facts by commencing the present action in the Federal District Court for the Northern District of Oklahoma (R.2), and on August 9, 1946, Summary Judgment was granted in favor of the present respondents (R.85) on the ground that the action was another attempt to relitigate issues concluded between the parties by other litigation (R.86).

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Subsequent to the entry of this Summary Judgment on August 9, 1950, the petitioners, by means of various motions carrying different names, reiterated, again and again, the identical facts upon which every Court trying the matter had theretofore ruled adversely to them. For the purpose of simplicity in this Statement, these motions will be considered under four headings because four orders of denial were entered thereon.

I.

On August 19, 1946, a Motion to Vacate Judgment and For a Hearing was filed (R.57), and on October 2, 1946, a Motion to Amend Motion to Vacate and Disqualify Judge Savage was filed (R.90). These motions were denied October 4, 1946 (R.98).

II.

On January 4, 1947, another Motion to Vacate Judgment and for a Rehearing (R.100) was presented, and was denied on May 7, 1948 (R.133).

III.

On August 3, 1948, another Motion to Vacate Judgment and for a Hearing on the Merits (R.134) was presented, and on August 16, 1948, another Application for Disqualification (R.136) was presented. On February 25, 1949, these motions were overruled, and the petitioners were enjoined from filing any other instruments without court order (R.185).

IV.

On April 1, 1949, a Motion to Amend and Thereafter to Vacate Order Granting Summary Judgment (R.187) was filed. This Motion to Vacate was denied May 9, 1949, and a permanent injunction was entered, enjoining the petitioners from "filing any action whatsoever in any Court involving the transaction which is the subject of this action or the title involved in this action and from filing any

CENTER

motions or other pleadings of any nature in this action." (R.223) Concerning the request for "amendment," the Court said: "the Court will permit the amendment of the Petition so as to show the actual action in the State Court as alleged in the Petition and its dismissal and without prejudice, and the filing in this case, which of course the record shows anyhow, of this action. Now that ought to complete your record, should it not?" (R.217).

The time for appeal to the United States Court of Appeals was extended thirty days on June 2, 1949 (R.224), and on June 24, 1949, Notice of Appeal was filed (R.225).

On November 23, 1949, Motion to Dismiss Appeal was filed by the present respondents in the United States Court of Appeals for the Tenth Circuit (R.279) and, on January 5, 1950, the same was heard and sustained (R.287); this decision is reported at 178 F. (2d) 923, and lays down no rule of law in conflict with the decisions of any other jurisdiction, being, in full, as follows: "PER CURIAM. Appeal dismissed January 5, 1950, on motion of appellee."

On January 27, 1950, a Petition for Rehearing was filed in the United States Court of Appeals for the Tenth Circuit (R.288), and, on January 31, 1950, this Petition was denied (R.291).

On April 17, 1950, the United States Court of Appeals for the Tenth Circuit denied the present petitioners leave to file a Motion to Reconsider (R.296).

The first of the motions under Group I was filed ten days after the Summary Judgment. Both motions in said group contained only reallegations of the original Complaint and argumentative matter.

The motion listed under Group II was presented one hundred forty-eight days subsequent to the Summary Judgment and nine-two days subsequent to the Order of October 4, 1946, denying the first Motion to Vacate. It

set out no new matter, realleging only the same arguments that had theretofore been advanced.

The first of the motions under Group III was presented seven hundred twenty-four days subsequent to the Summary Judgment, six hundred sixty-eight days subsequent to the Order of October 4, 1946, denying the first Motion to Vacate, and eighty-nine days subsequent to the Order of May 7, 1948, denying the second series of motions. It also contained no new matter whatsoever.

The last motion, under Group IV was filed nine hundred sixty-eight days subsequent to the Summary Judgment, nine hundred twelve days after the Order of October 4, 1946, denying the first Motion to Vacate, and thirty-five days after the Order of February 25, 1949, denying the third series of motions.

It should here be noted that from the time of the Summary Judgment (R.55) to the time of the filing of the Notice of Appeal (R.225), a total of two hundred forty days had elapsed when no motions or pleadings of any sort were before the Court.

The matter now comes before this honorable Court by Petition for Writ of Certiorari asking the Supreme Court of the United States to review the action of the Court of Appeals for the Tenth Circuit in dismissing the Appeal.

JURISDICTION

Certain jurisdictional requisites are set forth in the Petition. The attention of this honorable Court, however, is directed to the following facts: The petitioners have attempted to file a typewritten petition and record without proceeding *in forma pauperis;* although motion has been made to permit such filing, the motion had not been acted on by the Court within the time for appeal and no printed Petition has been filed as prescribed by Rule 26. Notice of the filing of such Petition, together with a typewritten copy of the Petition and supporting brief, was served on

counsel for respondent on July 10, 1950, while the Petition was filed with this Court on June 27, 1950, not within the ten days after the filing as required by Rule 38(3). Only an incomplete supplemental record of the proceedings in the United States Court of Appeals for the Tenth Circuit has been served on counsel for respondent and counsel for respondent has never received a copy of the basic record, contrary to the requirements of Rule 38(3).

QUESTION PRESENTED

The question as presented by the petitioners does not properly state the issue in this request for certiorari. The decision of the United States Court of Appeals does not state any law upon which to base a petition for certiorari. On the facts as shown by the record, and on the law applicable thereto, however, the only question presented should be stated as follows:

Whether several successive motions to vacate a final judgment, all based on the same grounds as the motion last previously denied, all directed to the discretion of the Court, all untimely filed, and none heard on the merits, will have the effect of suspending the finality of a final judgment, and whether the orders denying such motions are appealable.

RULES AND STATUTES INVOLVED

Rule 60 of the Federal Rules of Civil Procedure and Title 28, Sections 1291, 2107, United States Code, are involved in the present litigation, and are printed as Appendix A.

ARGUMENT

The issue in the present case has long since been determined by the decisions of the Oklahoma Supreme Court and of each other Court which has heard the matter; the rights of the parties herein have been properly determined by the simple application of existing law; and no amount of distortion of the facts as shown by the record

and of the law applicable thereto can convert the matter into one warranting review by this Court on certiorari.

When the United States District Court determined, through its Summary Judgment (R.55), that the present petitioners take nothing because any controversy between the parties had theretofore been determined in favor of the present respondents, said petitioners might have elected, within the time permitted, to perfect an appeal to the United States Court of Appeals. Instead, they chose, for a period of almost three years, to make attempts to relitigate the same facts through a series of vexatious motions, none of which could have had the effect of suspending their rights, if any, to appeal.

The decision of the Court of Appeals in dismissing the appeal was manifestly correct. No other result could have been reached for there is no conflict of decision on the facts herein involved. The applicable decisions of this Court, the accepted and usual course of judicial proceedings, and the provisions of the Federal Rules of Civil Procedure—all are in accord with the dismissal by the Court of Appeals; further decision by this Court would not resolve any conflict of opinion, nor would it determine any point of substantive or procedural law.

I.

THE DISMISSAL BELOW IS CLEARLY CORRECT

The Rules of Civil Procedure were drafted to secure the just, speedy, and inexpensive determination of every action (Rule 1, Federal Rules of Civil Procedure). It is the purpose of the law to put an end to personal disputes and to permit all members of society to live among themselves without perpetual conflict. Procedural rules were adopted to facilitate this end. Once a matter had reached final judgment, the litigants were precluded from harassing each other *ad infinitum*.

Since 1933, this matter has mushroomed into Jarndyce vs. Jarndyce proportions, the rights of the parties having

heretofore been determined by five different Courts. Before each Court, the present petitioners have restated the same facts over and over, have moved to vacate orders and decrees which have acquired the sanctity due all judicial decrees by reason of age, have dismissed without prejudice, have requested rehearings, have named attorneys as co-defendants and defamed judges, and have tried the patience of the Courts and of all persons connected with the litigation.

In the present action, the Summary Judgment on August 9, 1946 (R.55), was a final decision, is the only appealable decision entered in the case, and was filed with the Clerk of the District Court two years, ten months, and fifteen days (three terms of Court) prior to the date that Notice of Appeal to the United States Court of Appeals for the Tenth Circuit was filed on June 24, 1949 (R.225).

The United States Court of Appeals properly dismissed the Appeal because the present petitioners had exhausted their appellate rights by not prosecuting, within the required time, any appeal they might have had.

II.

THERE IS NO CONFLICT OF DECISION

In dismissing the Appeal, the Court of Appeals in effect held: (1) that the time had elapsed from which appeal could be taken from the Summary Judgment of August 9, 1946; (2) that the various motions filed did not have the effect of suspending the finality of the Summary Judgment; and (3) that the Orders denying these Motions were not appealable.

(1) More than ninety days from the Summary Judgment having elapsed, the Courts are in accord that the Appeal should be dismissed. In Nealon vs. Hill, 149 F. (2d) 883, 884, the Circuit Court of Appeals, Ninth Circuit, in 1945, under a factual situation in which a petition for rehearing had been filed after the final judgment and before appeal, dismissed the appeal, and said, "The appeal from

the Order of December 7, 1942, was taken too late—after the expiration of the time prescribed by Section 230, 28 U.S.C.A." (Citing Morse vs. U. S., 270 U.S. 151, 46 S. Ct. 241, 70 L. Ed. 518).

The Third Circuit of the Circuit Court of Appeals has held, in Walters vs. B. & O. R. R. Company, 76 F. (2d) 599, that the Court was without jurisdiction to entertain an appeal where more than ninety days had passed from the final judgment.

(2) This ninety-day period was not extended by the motions herein. This Court, as well as Courts of Appeals in all Circuits, have held that Petitions to Vacate and for Rehearing do not extend the time for review.

In Pfister vs. Northern Ill. Fin. Corp., 317 U.S. 144, 87 L. Ed. 146, it was said:

> "An appeal does not lie from the denial of a petition for rehearing. Conboy v. First Nat. Bank, 203 U.S. 141, 145, 51 L. ed. 128, 130, 27 S. Ct. 50, 16 Am. Bankr. Rep. 773; Bowman v. Loperena, 311 U.S. 262, 266, 85 L. ed. 177, 180, 61 S. Ct. 201, 44 Am. Bankr. Rep. (NS) 288; Brockett v. Brockett, 2 How. (U.S.) 238, 11 L. ed. 251; Roemer v. Bernheim, 132 U.S. 103, 33 L. ed. 277, 10 S. Ct. 12; Jones v. Thompson (CCA 8th) 128 F. (2d) 888; Missouri by Unemployment Compensation Commission v. Todd (CCA 8th) 122 F. (2d) 804, 47 Am. Bankr. Rep. (NS) 39.
>
> "On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts —if any are offered—support grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition

for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.

"In the present case it is quite plain the denial was grounded upon a failure of the petitions for rehearing to establish adequate grounds for the reexamination of the original orders. * * * The commissioner examined the petition for rehearing and determined that the debtor had had full opportunity to present his evidence at the hearing and that the stay was in accordance with the debtor's motion and that counsel for the debtor appeared at each hearing and knew of each order. He therefore concluded 'that there is no equity or merit in the petition for rehearing' and denied the petition. The petition for rehearing of the orders of September 7 was similarly handled.

"We therefore conclude that the Commissioner did not reexamine the basis of any of the original orders and that time for filing the petitions for review was not extended."

See also;

Conboy v. First National Bank, 203 U.S. 141, 51 L. ed. 128, 27 S. Ct. 50, 16 Am. Bankr. Rep. 773; Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 81 L. ed. 557, 57 S. Ct. 382, 33 Am. Bankr. Rep. (NS) 1; Bowman v. Loperena, 311 U.S. 262, 85 L. ed. 177, 61 S. Ct. 201, 44 Am. Bankr. Rep. (NS) 288; Gypsy Oil Co. v. Escoe, 275 U.S. 498, 72 L. ed. 393, 48 S. Ct. 112; Morse v. United States, 270 U.S. 151, 70 L. ed. 518, 46 S. Ct. 241; Chicago, M. & St. P. R. Co. v. Leverentz (CCA 8th) 19 F. (2d) 915; Chapman v. Federal Land Bank (CCA 6th) 117 F. (2d) 321, 45 Am. Bankr. Rep. (NS) 266; McIntosh v. United States (CCA 4th) 70 F. (2d) 507; Clark v. Hot Springs Electric Light & P. Co. (CCA 10th) 76 F. (2d) 918; Northwestern Pub. Serv. Co. v. Pfeifer (CCA 8th) 36 F. (2d) 5; Larkin Packer Co. v. Hinderliter (CCA

10th) 60 F. (2d) 491; Mintz v. Lester (CCA 10th) 95 F. (2d) 590, 36 Am. Bankr. Rep. (NS) 410; International Agri. Corp. v. Cary (CCA 6th) 240 F. 38 Am. Bankr. Rep. 753; Re David (CCA 3d) 101 F. (2d) 748, 14 Am. Bankr. Rep. (NS) 320; Re A (CCA 2d) 122 F. (2d) 393, 46 Am. Bankr. Rep. 522; Re Miller (CCA 6th) 111 F. (2d) 28, 42 Am. Bankr. Rep. (NS) 414; Re L. & R. Wister & Co. (CCA 3d) 237 F. 793, 38 Am. Bankr. Rep. 215.

(3) That none of the orders denying the various motions herein filed were appealable is well established. 31 Am. Juris. 95, Sec. 437, summarizes the general rule of law as follows: "That there may be only one final judgment in an action is a rule asserted and supported in any cases," and at 31 Am. Juris. 794, Sec. 793, it is said: The refusal of an application to vacate a judgment is a bar to subsequent proceedings, whether such subsequent proceeding is by motion or independent action seeking the same relief." (See also: Treat vs. Treat, 150 P. (2) 57 (Cal.); 49 C.J.S. 551.)

In Conboy vs. First National Bank of Jersey City 203 U.S. 141, 145, 27 S. Ct. 50, L. Ed. 128, this honorable Court said: "No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the Court and designed to afford it an opportunity to correct its own errors." (Citing: Brockett vs. Brockett, 2 How. 238, 17 L. Ed. 251; Wylie vs. Coxe, 14 How. 1, 14 L. Ed. 301).

The Circuit Court for the Eighth Circuit, in Jones vs. Thompson, 128 F. (2d) 888, 889, said with clarity:

> "Motions to vacate orders, motions for rehearings or for new trials, and like motions are addressed to the discretion of the trial court and are intended to call its attention to errors allegedly committed by it and to afford an opportunity for their correction. Orders granting or denying such motions are not appealable."

See also: Alexander vs. School District of Booneville, 132 F. (2d) 355, 358; Donovan vs. Jeffscott; 147 F. (2d) 198, 199; Hicks vs. Bekins Co., 115 F. (2d) 406, 409; Burns vs. Ender Coal Co., 104 F. (2d) 964, 966.

III.

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT OF CERTIORARI

The dismissal by the Court of Appeals only determined that the petitioners' appeal was out of time. No amount of semantics can create an impelling reason for this Court to grant the writ of certiorari. No conflict of opinion on a federal question has arisen among lower Courts. There is no question of wide import under the Constitution, laws, or treaties of the United States. This case presents no reason to exercise supervisory power over lower federal Courts. The Court of Appeals found nothing whatsoever new in the situation presented and based its opinion so completely on established law that it said simply: "Appeal dismissed January 5, 1950, on motion of appellee." The petitioners are simply requesting another hearing in a matter where the rights of the parties were fixed many years ago.

The petitioners claim that "the time for appeal from the Summary Judgment was enlarged by the filing, entertainment of, and consideration of the merits of each of several motions to vacate such judgment" (Petition and Brief, 10).

The rule of law that an untimely petition for rehearing will not have the effect of suspending the finality of a final judgment and extending the time to appeal from the original decision is so well established as to be the subject of an annotation at 148 A.L.R. 795. This annotation, quoting Denholm and McK. Co. vs. Comm., (C.C.A. 1st, 1942), 32 F. (2d) 243, points out that a petition for rehearing may be untimely in two senses: "(1) It may be filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for

appeal has expired, and (2) it may be filed after the statutory period for taking an appeal has elapsed." The motions herein were untimely under either of the above definitions.

(1) The various motions herein involved can only be considered motions under Rule 60 of the Federal Rules of Civil Procedure (Relief from Judgment or Order). This rule specifically provides: "A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." At the time of the adoption of the present rule, the Committee's explanatory statement noted: "A motion under Rule 60(b) does not affect the finality of the judgment, but a motion under Rule 59, *made within ten days*, does affect finality and the running of the time for appeal." (Italics supplied.) The very rule under which the motions were filed provides, contrary to the petitioners' contention, that such motions do not enlarge the time for appeal.

Even if any of the motions be considered motions under Rule 59 (New Trials), none but the first (R.57) were filed within the ten-day period.

(2) The time for appeal was not enlarged also because all of the motions except the first were presented after the statutory period for taking an appeal had elapsed. The second motion (R.100) was filed ninety-two days after the Order Denying the first Motion (R.98) and one hundred two days after the Summary Judgment (R.55); as heretofore pointed out, a total of two hundred forty days elapsed during which time no motions or pleadings of any sort were before the Federal District Court. The time for appeal from the Summary Judgment having thus elapsed, it could not be restored by the subsequent motions of the petitioners. Alexander v. School Distr. of Boonville, 132 F. (2d) 355, 358 (CCA 8th, 1943).

As pointed out in Pfister vs. Northern Ill. Fin. Corp., *supra*, where the Court merely considers whether the petition sets out, and the facts—if any are offered—support grounds for opening the original Order and determines

that no grounds for a reexamination of the original Orde rder
are shown, it does not constitute a consideration on th the
merits. At each of the hearings on the Motions herein, th the
Trial Court, at the most, merely considered whether th der.
Motions set out grounds for opening the original Orde dge
(R.112, 120, 121, 153, 219, 220, Suppl. R.24, 25). Judg We
Bower Broaddus, at the hearing on May 9, 1949, said, "W * *
have as a matter of fact four outstanding judgments * * ave
I wish you would explain to me how in the world I hav uld
authority or what legerdemain of law there is that I coul
set aside these four judgments.

* * * * *

"No appeal has been had from any of those judgments. ts.
They are absolute verity upon their face. If I had trie ied
them I doubt that I would have jurisdiction to set the em
aside at this late date because all of the facts were con on-
sidered.

* * * * *

"Judge Savage has passed upon this very questio ion
and it became a final judgment. * * * Then it was her dut ty
to appeal. Time to appeal has expired. There must be a an
end to litigation." (R.219, 220)

CONCLUSION

It is submitted that the record discloses no reason fo for
the exercise of sound judicial discretion in granting th the
writ of certiorari. The petitioners have had full oppo or-
tunity to present their claim and be heard; numerous tri-
bunals, for seventeen years, have been ruling adverse ely
to them. The Court of Appeals for the Tenth Circuit, in
dismissing the appeal, did so in absolute accord with th the
decisions of all other jurisdictions. There is no conflict
for this Court to consider. In the interests of securing
the national rights and uniformity of judgments, it is im-
portant that an end be put to this litigation.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

RULE 60. FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief from Judgment or Order

Mistakes: Inadvertence: Excusable Neglect: Newly Discovered Evidence: Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Writs of *coram nobis, coram vobis, audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Title 28, United States Code

§1291. Final decisions of district courts:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court.

Title 28, United States Code

§2107. Time for appeal to court of appeals:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * * * *

The district court, in any such action, suit or proceeding, may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

* * * * *